(1)

Supreme Court, U.S.
FILED

06-910 DEC 18 2006

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

SHARON COX,

Petitioner

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Sharon Cox
12582 McIntire Drive
Woodbridge, Virginia 22192
(703) 491-3999

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in affirming a Retaliatory Termination of DOD Inspector General Entry-Level Auditor.

Whether the court of appeals usurped function of a jury by making finding of fact and drawing inference from evidence in favor of movant, rather than determining whether genuine issue of material fact had been raised.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that she has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

RULE 29.6 STATEMENT.....ii

TABLE OF AUTHORITIES.....iii

PETITION FOR A WRIT OF CERTIORARI.....1

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

A. 1987 – 1998, Department of Defense (DoD) Service, ...2
Including Seven Year Meritorious Performance as GS-5 in DLA's Internal Audit Office

B. August 1998, Selected on Best Qualified List as GS-7 3
Auditor at DoD Office of Inspector General (DoD-OIG)

C. November 1998 – February 22, 1999 Aggravating Factors,.....3
Supervisor Fails to Give Relief from Mr. Gause's Repeated Retaliation and Protected Activity Before Cox Filed EEO Charge

D. February 25 – August 1999 Continuing Retaliation and 5
Negative Midyear Review After Cox Filed EEO Charges

E. October 12, 1999 Discharge Decision: Terminate GS-7.....6
Auditor on Two Charges (Stated Reasons): Failure to Qualify as an Auditor and Unacceptable Performance

F. Proceedings Below.....6

REASONS FOR GRANTING THE PETITION.....7

I. Holding pro se plaintiff to less stringent standard than those of a litigant represented by counsel.....7

II. Review is Warranted Because Court Opinion below Conflicts with Other Courts of Appeal and the Conflict is Not Addressed in the Opinion 8

III. A Review is Warranted Because the District Court Erred in Granting Summary Judgment Because Court Found That Cox Established a *Prima Facie* Case for Retaliation 9

IV. Review is Warranted Because the Court Below Disregarded Sufficient Evidence that the Reason for Midyear and Discharge is Pretext: 10

A. Evidence that Explanation of Two Termination Charges (Failure to Qualify as an Auditor and Unacceptable Performance) and Negative Midyear Review is Unworthy of Credence 10

B. Evidence that Supervisors Subjected Cox to Heightened Scrutiny After, Not Before, She Filed EEO Charges 13

C. Evidence that Supervisors Treated Cox Differently from Similarly Situated Male GS-7 Auditors.....13

V. Review is Warranted Because Court Below Disregarded Conflicting Evidence in the Record and Disputed Genuine Issues of Material Facts 14

A. Totality of Evidence of Retaliation 14

B. Aggravating Factors .....

CONCLUSION 15

DECLARATION OF COMPLIANCE 16

APPENDIX A1

INDEX TO APPENDICES

APPENDIX A: Order denying a timely filed petition for rehearing and rehearing En Banc of the United States Court of Appeal for the Fourth Circuit, No. 05-1758, CA-04-476-1, September 19, 2006 ..... A1

APPENDIX B: Per Curiam of the United States Court of Appeals for the Fourth Circuit, No. 05-1758, CA-04-476-1, July 20, 2006 ..... A2

APPENDIX C: Order and Opinion of the United States District Court for Eastern District of Virginia, No. 1:04cv476. May 10, 2005 ..... A8

TABLE OF AUTHORITIES

Cases ..... **Page Number**

Aman v. Cort Furniture (3rd Cir 1996).....10

Anderson v. Liberty Lobby, Inc., 477 U.S. at 242 (1986).....

Celotex v. Catrett, 477 U.S. 317,322-23 (1986).....

Conley v. Gibson, 355 U.S. 41, 45-46 (1957).....

Dioguardi v. During, 139 F. 2d 774 (2d Cir. 1944).....16

Drennon-Gala v. DOJ, EEOC Appeal 07A20123, May 13, 2004

Haines v. Kerner , 404 U.S. at 520, 521 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).....7

Harison v. Metropolitan Government of Nashville 80 F.3d 1107 (6th Cir. 1996).....8

Hochstadt v. Worchester Foundation for Experimental Biology, Inc., 425 F. Supp318, 324 (D. Mass.), aff'd 545 F.2d 222.....

Holland v. Jeff Nat'l Life Insur, 883 F 2d 1307 (7th Cir Ind 1089)

Hossaini v. Western Missouri Medical Center, 97 F.3d 1085 (8th Cir. 1996).....

Hughes v. Rowe, 449 U.S. 5, 9 (1980) [quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972).....7

Jensen v. Potter (3rd Cir, 2004).....8, 9

LaFond v General Physics Services Corp,
(2nd Circuit, 1995).....10

McDonnell Douglas Corp. v. Green, 411 US 792 (1973).....9

St. Mary's Honore Center v Hicks, 509 U.S. 500, 519 (1993).....10

Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133,
120 S. Ct. 2097 (2000).....10

Texas Dept of Community Affairs v. Burdine, U.S. 450 B
at 256.5 (1981).....

Turner v. Reynolds Ford, Inc, (10th Circuit, 1997), No. 97-6152....7

Statues and Rules

Title VII of the Civil Rights Act of 1964.....1

Title VII of the Civil Rights Act of 1991.....1

42 USC §2000(e) et. Seq. 1

29 CFR §1614, 107(a).....2

Rules of Supreme Court 14.1(d).[1] viii

Fed R. Civ. P. 56(c) 15

Other Authorities

Inspector General Regulation 1400.4 "*Audit Handbook*", Department of Defense, Office of Inspector General, CA App 58-59 .....2, 12

1. Rule 14.1(d) allows petitions to contain citations of unofficial reports of the opinions entered by courts or administrative agencies.

"*Government Auditing Standards*", Government Accounting Office (GAO), Continuing Education Requirement, Working Papers, Quality Control, CA App 60-69 12

"Internal Audit Manual", DOD 7600.7-1, Department of Defense, Office of Inspector General.....2

"EEOC Compliance Manual", Section 8-I7, Retaliation: Pretext eeoc.gov/policy/docs/retal.html.....9

Office of Personnel Management, *Delegate Examining Operations Handbook*, Section 8 Certification Procedures, CA App 262-265....1

PETITION FOR WRIT OF CERTIORARI

Petitioner Sharon Cox, a discharged GS-7 auditor at Department of Defense Office of Inspector General (DOD-OIG), who was rated a negative Midyear Review and terminated (for failure to qualify as auditor and unacceptable performance) in retaliation for protected activity, complaining about team leader's conduct and supervisor's lack of action, and filing EEO charges, respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals is unpublished. Appendix ("App.") A2 - A7. The opinion of the District Court granting respondent's motion for summary judgment (A9 - A28), is unpublished.

JURISDICTION

The court of appeals decision was July 20, 2006. A timely petition for rehearing and rehearing en banc was denied by the court of appeals on September 19, 2006, and a copy of the order denying rehearing appears at Appendix A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

EEOC Compliance Manual, Section 8, "Retaliation", II, provides that "pretext is proved through evidence that the respondent treated the complainant differently from similarly situated employees or that the respondent's explanation for adverse action is not believable... respondent subjected the charging party's work performance to heightened scrutiny after she engaged in protected activity."

Title VII of the Civil Rights Act of 1964, As Amended (Title VII) 42 USC §2000e-6a Government Employee Rights Act of 1991, provides to "protect the rights of certain government employees,

with respect to their public employment, to be free of discrimination on basis of race, color, religion, sex, national origin, age, or disability."

29 CFR §1614.101(b) provides that "no person shall be subject to retaliation for opposing any practice made unlawful by Title 7 of Civil Rights Act (Title VII) (42 USC §2000e, et seq.) for participating in any stage of administrative or judicial proceeding under those statues." Sec 2000e-2 provides "unlawful practices: (a) employer practices. It shall be an unlawful employment practice by an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, term, condition of privilege of employment, because of such individual's race, color, religion, sex, or national origin"

Department of Defense's Office of Inspector General (OAIG) Audit Handbook, provides "that Introductory Auditor Training School... required by entry level auditors to perform their jobs successfully."

Government Auditing Standards, Government Accounting Office (GAO), 1994

STATEMENT OF THE CASE

A. 1987 – 1998, Department of Defense (DoD) Service, Including Seven Year Meritorious Performance as GS-5 in a DoD Internal Audit Office

Cox worked 11 years with unblemished and meritorious performance at Department of Defense (DoD). From 1987 to 1991 Cox worked 4 years part time at Defense Logistics Agency (DLA), Alexandria, VA. From 1991 to 1998 internal audit office at DLA's Defense Energy Supply Center (DESC) hired Cox full time as a GS-5 secretary. Audit chief rewarded Cox's service and high performance by authorizing funds for accounting and auditing classes at Strayer University and contract classes at Defense Acquisition University (DAU) to assist auditors in conducting contract audits to qualify as a federal auditor. In compliance with DOD IG Internal Audit Manual. CA 58-59 Audit chief assigned

Cox five audits: Abuse of Government Credit Card, Abuse of Travel Expenses, Abuse of Leave, Natural Gas Audit, and BRAC. In 1991 Cox's duties required her to gain a secret security clearance. Audit chief assigned Cox as audit Point Of Contact (POC), which was previously performed by a GS-7 auditor. Supervisors valued her contributions and awarded five annual $1,200 performance awards for services on 5 audits and four $250 service awards for contributing to agency's efficiency and BRAC audit. Court of Appeals Joint Appendix ("CA App") 86, 282-286

B. August 1999, Selected on Best Qualified Candidate List as GS-7 auditor at DoD-Inspector General

1. August, 1998 DoD IG qualified and selected Cox as Best Qualified Candidate using OPM's 5-step qualifying process: 1) DoD IG personnel qualified Cox as GS-7 on Certificate of Eligibles, for education (B.A. degree Purdue University and 24 semester hours accounting) and audit experience; 2) a panel of two interviewers selected and approved Cox as qualified; 3) audit of Certificate of Eligibles and Cox's job application; 4) passing a drug test; and 5) passing a secret security clearance. CA App 83-88, 172

2. October 1998 Cox was hired as GS-511-7 entry-level auditor with annual non-competitive promotions to GS-12 by Office of Secretary of Defense, Office of Inspector General (OIG), Arlington, VA in Acquisition Management Directorate (one of five audit directorates of 400 auditors), in John Meling's Weapons Division (supervise 21 auditors in 3 branches), in Jack Snider's Branch (supervise 6 auditors). CA App 172

C. *November 1998 – February 22, 1999, Aggravating Factors:* Supervisor Fails to Give Relief from Mr. Gause's Repeated Retaliation and Protected Activity Before Cox filed EEO

1. Between November 1998 and June 1999, Cox reported many incidents to Mr. Snider regarding team leader Neal Gause's repeated threats while in uncontrollable volatile rages. Evidence is supported

by Cox's contemporaneous diary. Cox recorded events at work since 1991. CA App 89-105

2. Cox reported anti-retaliation complaints provision under Title VIII when she reported to Mr. Snider about Mr. Gause's conduct on the following dates:

November 20 and 21, 1998 Cox protested about Mr. Gause's unwelcome sex stories in a car enroute from a New Jersey field audit to head quarters. CA App 92.

December 17, 1998 upon return from two week field audit to Oklahoma and Alabama, Cox reported Mr. Gause's rages in public at airport, on audit site, and at motel. Mr. Gause retaliated and falsely accused Cox not working credit hours. Cox cried when Mr. Gause tried to denied credit hours she labored. CA App 95 Mr. Snider approved the credit hours based on Cox's date-stamped computer disc. See Cox's Leave Statement CA 126. He previously approved Cox's credit hours on field audit.

January 5, 1999 Mr. Gause retaliated by getting Mr. Meling's approval to deny Cox working future credit hours. CA App. 97

January 29, Cox's contemporaneous diary records Mr. Gause's derogatory remarks about Cox's performance while in irrational rages. Snider witnessed Gause's threats while in a tirade to beat her like his female dog and get rid of her. This was not a performance meeting called by Snider.. CA App 100.

February 11, 1999 Gause directed four volatile rages against Cox in one day. While in a rage he unreasonably ordered Cox to report to him every 10 minutes, making impossible for a subordinate to perform satisfactorily. CA App103. Cox initiated meeting with Snider to report Gause's conduct. This was not a performance meeting called by Snider. CA App 103

While Cox reported that IG supervisors failed to take corrective action in repeated requests to stop Mr. Gause's rages, instead they retaliated against her. CA App 102-103

D. February 22-August 1999 Continuing Retaliation and Negative Midyear Review After Cox filed EEO charges

1. On February 22, 1999, Cox emailed Messrs. Snider and Meling "No choice - no contact with Gause", listing two of many incidents. CA App 151 Seeing a pattern of his body language, Cox feared Gause's rages would turn physically violent. Diary records on February 11: "fear he will hit me" CA App 103

2. On February 25, 1999, Cox filed EEO complaint for pattern of continuing violations and retaliation over 3 months since November and denied Cox's right and benefit of 3-week Inspector General Audit class for all federal entry level auditors. CA App 152-154. On February 25, Cox notified Messr. Snider and Meling by email. CA App 158

Mr. Snider violated IG regulation to provide Cox the class "required by entry level auditors to perform their jobs satisfactory", before her midyear progress review; forced Cox without the benefit of the mandatory class to conduct field audits in five states on three weapons projects (Blackhawk Helicopter, KC135, Picatinny) and write audit workpapers. CA App127, 149

3. On Feb 27, Snider immediately started heightened scrutiny: sent first of 5 emails about assignments. CA App 162-169

4. After Mr. Gause was removed as Cox's team leader on February 25, 1999, he continued to retaliate: CA App 151

4a. On March 8, he threatened to get rid of Cox CA App 107

4b. On April 1, he physically assaulted (i.e. rammed his body into) Cox. Snider testified to the incident. CA App 110

4c. On May 5, Mr. Gause, subject of Cox's EEO complaint, input most of falsehoods in her Midyear Review. CA App 185-192. Cox notified Snider and Meling of the falsehoods. CA App 194-204

5. Cox notified by email Snider and Meling that she filed EEO Retaliation Complaint June, 1999 against Snider for Midyear Review. CA App 218-9

6. On June 7 and July, 1999 Agency's (DoD) physicians treated Cox for symptoms and lupus related to retaliatory work site. CA App 116, 118

7. On June 30 Dr. Shostak email to Mr. Meling linking Cox's diagnosis of "traumatic reaction and its relationship to that office". CA App 223

8. On June 30 Cox filed for Workers' Compensation naming Messr. Gause and Snider as subjects. CA App 225-238

8. On August 4, Mr. Snider retaliated by issuing Discharge Proposal CA App 239

E. October 12, 1999, Discharge Decision: Terminates GS-7 Auditor on Two Charges (Stated Reasons): Failure to Qualify as Auditor and Unacceptable Performance

1. On Oct 12, 1999 Mr. Meling issued Discharge Decision of the most adverse personnel act, "discharge" from federal service after 12 years of federal service on two charges. CA App 272-273

2. On Nov, 1999, Meling failed to respond to Cox's email for her job back.

G. Proceedings Below

1. Cox's discharge forced her for lack of gaining employment to file an appeal to EEOC without counsel. EEOC upheld agency's finding.
2. Cox's discharge forced and denied her to gain employment to hire a lawyer to file suit in district court without counsel as pro se against DoD inspector generals. CA App 10-14

3. District court entered a Summary Judgment for Respondent, but finding that Cox "is able to establish a prima facie case of retaliation." A8-28

4. Court of appeals affirmed the district court's summary judgment. A3

5. Cox filed pro se petition for rehearing and rehearing en banc, which was denied. A1.

6. This case involves scope of Congress' power to protect federal employees from retaliation of termination from 12 years federal service for filing a prior EEO complaint against retaliatory supervisors.

ARGUMENT: REASONS FOR GRANTING THE PETITION

I. Holding pro se plaintiff to less stringent standard than those of a litigant represented by counsel. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, [quoting 404 U.S. 519,520]; *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957); *Dioguardi v. Durning*, 139 F. 2d 774 (2d Cir. 1944)

II. Review is Warranted Because the Court Opinion Below Conflicts with Other Courts of Appeal and/or the Conflict is Not Addressed in the Opinion

Court below's decision regarding performance conflicts with this Court decisions regarding retaliatory performance discharge, and pretext in the following cases:

Turner v. Reynolds Ford, Inc., (10th Circuit, 1997). The Tenth Circuit remanded district court's Summary Judgment, ruling that close temporal proximity between plaintiff's complaints and her discharge indicates an inference of retaliatory motive. Evidence of pretext: Reynolds Ford did not discharge others whose sales performance failed to meet Reynolds Ford's requirements. Facts were presented in the light most favorable to plaintiff.

Close scrutiny of complaining employee is actionable. *Harison v. Metropolitan Government of Nashville*, 80 F.3d 1107 (6th Cir. 1996)

Some courts below acknowledged that plaintiff established a prima facie case of retaliation and remanded it to the district court. *Jensen v. Potter (3rd Cir, 2004).*

Some courts remand cases when the record presents sufficient evidence to support an inference that he was discharged in retaliation for reporting violation of federal law. *Lafond v. General Physics Services Corp*, (2nd Cir 1995)

Some courts rule that reporting sexual harassment to supervisor establishes protected activity. Result: retaliation is dated from the time retaliation plaintiff reported to her supervisor instead of from time plaintiff files the EEO complaint. *Jensen* (3rd Cir. 2004).

Fourth Circuit conflicts with Third Circuit: by setting the date when Cox filed the EEO complaint on February 25, 1999, rather than November 20, 1998 the date Cox first reported to Snider about Gause's conduct. Applying *Jensen* would set the date for retaliation and performance at November. 20-21 and December 18, 1998 when Cox first reported to Mr. Snider about Mr. Gause's hostile conduct.

Some courts rule in light of evidence and drawing all inferences in plaintiff's favor, a reasonable jury could conclude there was no unsatisfactory performance and failing to qualify for the position and that the Defendent's proffered reason is a pretext to mask a retaliatory motive. *Aman v. Cort Furniture* (3rd Cir 1996)

Some courts reverse in light most favorable to plaintiff a reasonable jury could conclude that given her exemplary employment history, and general evidence of hostile environment, plaintiff was fired because she had protested retaliation to Defendent. *Aman v. Cort Furniture* (3rd Cir 1996)

The Courts below failed to address the first reason for discharge in Discharge Decision: Failure to Qualify as an Auditor

III. A Review is Warranted Because the District Court Erred in Granting Summary Judgment When It Found That Cox Established a *Prima Facie* Case of Retaliation. A5, A24

Jensen v. Potter (3rd Cir, 2004). Both courts below acknowledge that Cox demonstrated a ***Prima Facie*** case of retaliation. A5, A24

Cox presented sufficient evidence to create a material issue of fact that employer's reason for negative midyear and subsequent discharge is pretext.

Some courts reverse the district court's judgment and remand when it finds that there is enough evidence to establish a *prima facie* case for reasonable jury to decide. *Jensen v. Postmaster General US Postal Service* (3rd Cir. 2004). In this case, district court did not schedule proceedings when it that found that Cox established a *prima facie* case for retaliation. A24

The court below erred when it did not address the first charge of discharge, failure to qualify as a GS-511 auditor. CA App 272

Court below erred when it ruled "DOD's stated reasons for her termination—that she produced no work to reevaluate." A6 DOD's Discharge Decision clearly gave two stated reasons for discharge: "failure to qualify as an auditor and "unacceptable performance". The Discharge Decision is silent on any reason of "produced no work to reevaluate". CA App 272

The court below erred when it ignored Dr. Shostak's and DOD physicians' reason Cox took sick leave. Dr. Shostak's fax to Mr. Meling diagnosed traumatic reaction to that office, but Cox could return to work in another office. CA App 223 With crass disregard for her illness, Snider and Meling singled Cox out for inequitable treatment, retaliated, and made no effort to get her back to work. Meling refused to assign Cox to another office. The Directorate had nine GS-7 entry-level auditor vacancies. Snider approved all Cox's sick leave based on Dr. Shostak's letter to Mr. Meling.

After discharge October 1999, Cox e-mailed Mr. Meling, asking for her job to continue to use skills and knowledge at DoD Inspector General, which DoD had educated and trained for 8 years. He failed to respond.

IV. Review Is Warranted Because Court Below Disregarded Sufficient Evidence That the Reason for Midyear and Discharge is Pretext

EEOC Compliance Manual, Section 8, II, "Retaliation" identifies three elements of pretext to rebut discharge officials' reason for midyear and discharge. This Court outlined burden shifting framework of pretext. *McDonnel Douglass Corp. v Green*; 411 U.S. 792 (1973). *Hochstadt v. Worchester Foundation for Experimental Biology, Inc.*, 425 F. Supp318, 324 (D. Mass.), aff'd 545 F.2d 222. This Court gave guidance on evidence that agency's explanation is pretext. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 S. Ct. 2097 (2000); *St. Mary's Honore Center v. Hicks*, 509 U.S. 500, 519 (1993).

The courts below failed to view the 3 elements of pretext evidence for Midyear and discharge in the light most favorable to Cox and to draw all reasonable inference in her favor. A5-7, A24-28

A. Evidence that explanation of two termination charges (Failure to Qualify as GS-7 Auditor and Unacceptable Performance) and Negative Midyear are Unworthy of Credence

1. Evidence that Cox was qualified and Certificate of Eligibles never set aside.

1a. *Certificate of Eligibles*, qualifying Cox as GS-7 auditor, was never set aside, disqualifying Cox as an auditor. CA App 87-88

1b. August 1998 before appointing Cox, DoD IG complied with Office of Personnel Management (OPM)'s 4-step qualifying process: 1) DoD IG delegated examining unit qualified Cox as GS-7 on *Certificate of Eligibles*, for education and experience required on the job announcement; 2) a panel of two interviewers selected and

approved Cox as qualified; 3) an audit was conducted of Certificate of Eligibles and Cox's job application; 4) drug test and secret security clearance required by the job announcement. CA App 83-88, 175

1c. If DoD IG had made an error on Certificate of Eligibles, OPM policy at "Examining Office Error", "If after the certificate has been issued, an Examining Office error is discovered... If an appointment has been made, it has long been the practice at OPM to consider erroneous appointments made due to Examining Ofice error as an "Error the Commission". In this case the incumbent is not removed from his position".. CA App 265

1d. 13 months after DoD IG certified Cox on the Best Qualified Applicant list and selected Cox as GS-7 auditor, Meling discharged Cox allegedly failing to qualify as an auditor. CA app __

2. **Evidence that Cox was performing satisfactorily** conducting audits on three weapon systems projects (Black Hawk helicopter, KC135 aircraft, Picatinny):

2a. The record is silent that Messr. Gause, Snider or Meling issued Cox letters of deficiency, warning, caution, reprimand, or emails about submitting reports untimely, improper report format, missed deadlines, unsatisfactory performance before Cox's EEO complaint on Feb 25, 1999 and before Midyear Review May 6, 1999. CA App 158

2b. The record is silent that Messr. Gause, Snider and Meling notifed Cox in email or letters of unsatisfactory performance before Mid-year Review.

2c. Prior to engaging in protected activity on February 25, Cox was not disciplined for deficiency in performance in accordance with IGDR1400.4. CA App 170-172

2d. During first six months of duty, Snider's repeated approval of travel funds (airline, lodging, taxi, and food expenses) to repeatedly send Cox to 5 states to conduct audits without the benefit of

Introductory Audit class; Supervisors cannot have it both ways. If supervisor repeatedly approved travel funds to 5 states, it meant Cox was performing satisfactorily. If Cox was performing unsatisfactorily, he failed to schedule her in an earlier 3-week Introductory Audit class "required by entry level auditors to perform their jobs successfully." IG Audit Handbook CA App 149

2e. Mr. Schornagel's affidavits reviewed Cox's workpapers. As a retired GAO and Department of Justice (DOJ) supervisory auditor, his review complied with DoD IG *Audit Handbook's* test to review preparing workpapers: "an experienced auditor having no previous connection with the audit". CA App 138, 674-676. GAO assigned , him to conduct DoD audits at the Pentagon, thus complying with GAO's *Government Auditing Standards* for *Quality Control* in reviewing Cox's workpapers, CA App. 66-68

2f. Evidence that Snider wrote "Good Workpapers" on "Supervisory Review" of Cox's 7 audit workpapers on Picatinny project. He assigned Cox as sole preparer of all workpapers on Picatinny project after returning from New Jersey, because she had prior audit contract experience at DLA. CA app 174

2g. Snider assigned Cox, instead of other senior auditors, to conduct and prepare all Pictatinny workpapers because the audit project required 1) knowledge of government contracts. Cox gained the knowledge in government contract classes at Defense Acquisition University, which had been funded by Audit Chief at DLA. CA App 174-176, and 2) Cox had contract audit experience.

2h. Evidence of 5 annual top performance ratings, prior to engaging in protected activity. Cox received $1200 awards for 5 prior annual performance ratings for conducting audits and four $250 service awards, one of which was for BRAC audit.

2i. After making complaint regarding hostile work environment, Cox received lowest performance evaluation in 12 years of DoD service. *Holland v. Jeff Nat'l Life Insur* 883 F2d 1307 (7th Cir Ind 1089)

2j. On January 29 and February 11, Mr. Gause retaliated for complaints to his supervisor for his "exploded in rages to get rid of me", before Cox filed the EEO complaint on February 25. CA 100

2k. Mr. Gause retaliated for being removed as Cox's team leader by falsely stating in an official federal document (Midyear Review) that Cox "took an average of 28 working days to prepare a workpaper." When questioned under oath he changed the story from 28 to 4.5 days for Cox to complete a work paper. CA App 186, 606

2l. Cox notified Mr. Meling that the calculation was 2 days, not 28 days. He failed to correct the record. He signed the Midyear Review knowing Gause's facts were false. CA App 184, 194-198

B. Evidence That Messrs. Snider and Dzik Subjected Cox to Heightened Scrutiny after, not before, she filed EEO Charges Against Gause.

The court below erred by ignoring the timeline – Record is silent Snider sent Cox emails regarding workpapers assignment prior to filing an EEO complaint on February 25. Snider emailed Cox first of 5 emails on February 27, after she filed EEO compliant. CA App 167,169

C. Evidence Supervisors treated Cox differently from similarly situated male GS-7 Auditors

1. Males were given the benefit of Introductory Audit class in their second month of duty, before sent to conduct field audits, before writing field audit workpapers, and before their midyear review.

2. Mr. Snider went outside his branch and division to get Sean Davis, unlike Cox, in the Introductory Audit class in his second month of duty. CA App 78

3. Males, were not assigned to prepare audit workpapers with one-day deadlines, as teamleader required of Cox. CA App 240

4. Mr. Davis and Cox were given "I" for "Improvement" in several categories on their Midyear Review. Unlike Cox, Davis was not discharged but promoted to GS-9. CA App 81, 183
5. Males were not subject to close scrutiny of their work, nor sent emails setting workpaper deadlines.
6. Record is silent that males were forced to take sick leave because of irrational raging retaliatory Mr. Gause.
7. Males were not treated and diagnosed by agency's (DoD) physicians and psychologist with "traumatic reaction to that office", and did not take sick leave to avoid retaliatory conduct, causing sleep deprivation, headache, rashes, diarrhea, vomiting, etc. CA 223
8. Males did not file EEO complaints against Mr. Gause and Snider.
9. Males were not ordered to report to team leader every 10 minutes like Cox. CA App103
10. Males were not denied credit hours. Cox was singled out for inequitable treatment in working credit hours for a condensed workweek schedule. CA App 97

V. Review is warranted because court below disregarded disputed material facts in light most favorable to Cox

A. **Court failed to consider Totality of all Evidence**. Bbefore Cox filed an EEO complaint on February 25, Mr. Gause displayed a pattern of retaliation and rages for Cox complaining to his supervisor on December 17, January 29, February 11. See this petition at B 2

B. **Court below Ignored Aggravating Factors**

1. Cox was not given a choice, either take sick leave as ordered by Dr. Shostak, or face continuation of repeated retaliation by Messr. Gause and Snider, resulting in continued decline in health.

2. Fax of DoD referred psychologist, Dr. Shostak, to Mr. Meling linking diagnose of traumatic reaction to that office. CA app 223

3. DoD's own internalists treated and medicated Cox for work site trauma.

4. Conduct of DoD Inspector Generals' abuse of authority and Snider's lack of taking action against Gause. See Cox contemporaneous diary. CA App 89-109

5. Summary judgment is granted if there is no dispute as to a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.s. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

6. EEOC makes it unlawful to retaliated against employee who have filed prior EEO complaints. Cox exerted her rights of retaliatory termination protected by law. Result:
1) Lost 9 and half years of Federal Employee Retirement System (FERS) withheld automatically from paycheck (DoD ruled Cox lacks the ten years to qualify for FERS annuity)
2) Lost the $400 Cox contributed to FERS for maximum 1.5 years part time service 1990-1991
3) Lost ability to gain employment in her chosen field of accounting/auditing and non-accounting positions
4) Lost job history (forced to put "Termination" at "Reason for leaving" on job applications), so rejected in 500 prospective jobs
5) Lost opportunity to perform as federal servant as auditor
6) Lost 3 annual non-competitive promotions to GS-12,
7) Lost her livelihood and financial future
8) Lost enjoyment of her home (forced to move to 10x20 area in basement and rent upstairs to support herself)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sharon Cox, Petitioner

December 18, 2006

DECLARATION IN COMPLIANCE

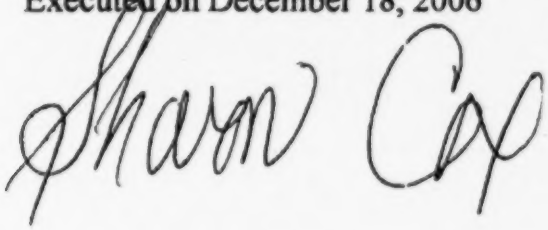
In compliance with 28 U.S.C.§1746 and Supreme Court Rule 29.5, I, Sharon Cox, do swear or declare that on this date, November 20, 2006, as required by Supreme Court Rule 29 I have served 3 copies of the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, by depositing an envelop containing the above documents in the United States mail properly addressed to them and with first-class postage prepaid.

The name and address served is as follows:
Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001

I am not a member of the Bar of the U.S. Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 2006



UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 19, 2006

No. 05-1758
CA-04-476-1

SHARON S. COX

Plaintiff - Appellant

v.

DONALD H. RUMSFELD, Secretary Department of Defense,

Defendant - Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's pro se petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Traxler, Judge Duncan, and Senior Judge Hamilton.

For the Court,
/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1758

SHARON S. COX

Plaintiff - Appellant,

Versus

DONALD H. RUMSFELD, Secretary Department of Defense,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge (CA-04-476-1)

Submitted: July 7, 2006 Decided: July 20, 2006

Before TRAXLER and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Steven G. Raikin, Washington, D.C., for Appellant. Paul J. McNulty, United States Attorney, Rachel C. Ballow, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Sharon Cox appeals from the district court's award of summary judgment to her former employer, the United States Department of Defense ("DOD"), on her claims of multiple violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e at seq. (2000). Cox challenges on appeal only the award of summary judgment on her retaliation claims. For the reasons that follow, we affirm.

I.

Because of the procedural posture of the case, we recite the facts in the light most favorable to Cox. She began work as a DOD Office of Inspector General ("OIG") auditor in October 1998, and was terminated a year later. Almost immediately after starting at the OIG, Cox began to complain of harassment by her supervisor, Neal Gause. In her complaint, she alleges that she was subjected to "a hostile work environment, sexual harassment, repeated threats, intimidation, unfair treatment because of her gender, and one instance of unwanted physical contact." J.A. 14.

In terms of her work, Cox experienced difficulty submitting required reports in a timely manner and in the proper format. After noticing these ongoing problems, Gause and his supervisor, John Snider, met with Cox to discuss their concerns. Shortly after this meeting, Snider and his supervisor, John Meling, contacted the DOD personnel office to discuss problems that they had been having getting Cox to meet auditing standards and deadlines.

Cox attributed any deficiencies in her work to the fact that the DOD delayed in providing her with required training and to the

stress caused by ongoing public humiliation by Gause. On February 22, 1999, Cox asked to be removed from Gause's supervision. Snider acquiesced to this request and placed her under his direct supervision until a lower level supervisor, John Dizik became available in March 1999. Three days after making the request to have no further contact with Gause, Cox filed an Equal Employment Opportunity ("EEO") complaint alleging gender discrimination and a hostile work environment.

Once Cox was under Snider's supervision, he began to closely monitor her progress and ability to meet deadlines. This monitoring continued until she was transferred to Dizik's supervision. Dizik often attempted to meet with Cox to discuss her performance but was unable to do so prior to her midyear review as she consistently rescheduled the meetings.

On May 6, 1999, Cox had her midyear review. The review indicated that she needed improvement in every area of auditing necessary for her job, but, because she had not received the necessary training, provided for a three month period for reevaluation. Cox attended the requisite training session for three weeks starting May 8, 1999, but, upon completion, only came back to the office for one day. On June 21, 1999, she briefly returned to the office and filed a second EEO complaint alleging that her poor review was retaliation for her initial complaint. She immediately thereafter took a combination of sick and annual leave until she was terminated on October 15, 1999.

In August 2000, the EEO office issued a Final Agency Decision finding for the DOD on all of Cox's complaints. Cox timely appealed the decision to the Equal Employment Opportunity Commission ("EEOC"), where an Administrative Law Judge conducted hearings and then ruled for the defendant in August of 2003. Six months later, the EEOC denied her petition for a rehearing. Cox timely appealed the EEOC's decision to the district court, which granted summary judgment for the DOD on all of her claims. This appeal followed.

II.

This court reviews a grant of summary judgment de novo, viewing all inferences in the light most favorable to the nonmoving party. Bagir v. Principi, 434 F.3d 733, 741 (4th Cir. 2006). Summary judgment should only be granted when there are no issues of material fact. See Celotex Corp v. Catrett, 477 U.S. 317, 322

(1986). The sole issue on appeal is whether the district court erred in granting summary judgment on the retaliation claims.

To establish a claim of retaliation, a plaintiff must show (1) that she engaged in a protected activity, (2) that the employer took an adverse action against her and (3) that a causal connection existed between the protected activity and the adverse action. Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998). Once a prima facie case is established, the court must consider whether the defendant has proffered a legitimate, nondiscriminatory reason for the action; if so, the plaintiff must prove that the rationale is a pretext for retaliation. See McDonnell Douglass Corp v. Green 411 U.S. 792, 802-804 (1973); Mundy v. Waste Management of North America, Inc., 126 F.3d 239, 242 (4th Cir. 1997). We consider Cox's claims with respect to her poor midterm review and termination separately.

A.

The DOD does not contest that Cox established a prima facie case of retaliation upon receiving a poor midyear review shortly after filing her first EEO complaint. See King v. Rumsfeld, 328 F.3d 145, 151 (4th Cir. 2003). Thus, the question becomes whether the DOD offered a valid explanation for the midyear review, and, if so, whether Cox carried her ultimate burden of proving that the explanation was pretextual.

The record before us reveals no questions of fact with respect to the accuracy and supportability of Cox's midyear review. As the district court noted, Cox's own evidence supports that the DOD voiced concerns regarding her performance well before she filed her first EEO complaint. That complaint references numerous critical comments about the substantive deficiencies and untimeliness of her work. Those comments are consistent with both the documented assessment of the midyear review itself and the testimony of Cox's supervisors, both of which detail her failure to complete assignments in a satisfactory and timely manner. Cox's own after-the-fact assertions about her performance are not enough to prove that the justification was pretextual.[1] See Hawkins v. PepsiCo, Inc.,

---

1 Cox also submitted an affidavit by Henry Schronagel [sic], a retired government auditor with a lengthy career in public service, who had reviewed her work papers and found them to be acceptable,

203 F.3d 274, 280 (4th Cir. 2000); Evans v. Technologies Services & Applications Co., 80 F.3d 954, 960 (4th Cir. 1996).

B.

Next, Cox asserts that her termination from the DOD was retaliation for her second EEO filing. She bases this claim on the fact that the proposal to dismiss her from her job was written in August 1999, shortly after she had filed an EEO complaint in June 1999 and thus was prima facie retaliatory. See King, 328 F.3d at 151. As discussed above, however, once a prima facie case is established, Cox must prove that the DOD's rationale for her dismissal was pretextual.

The DOD responded to the prima facie case by first pointing to the dissatisfaction with her work reflected in the midyear review, and then by noting that her absence from work meant that there was no new work product for it to reevaluate. It then fell to Cox to show that her absence, lack of work and poor work product prior to the review were merely a pretext for retaliation.

Once again Cox offers her own assertions, supported in some respects by Schronagel, of abuse, retaliation, and her competence as an auditor, none of which go to prove that the excuse offered by the DOD was pretextual. See Evans, 80 F.3d at 960. She also points to alleged disparities between her treatment and that of male employees whose midyear reviews showed that they needed improvement. However, she provided a review for only one other employee, and it was not, on its face, nearly as negative as Cox's. J.A. 79, 183. More significantly, however, that employee did not spend the next three months out of the office and thus not manifest improvement. Finally, Cox points to the fact that her therapist recommended that she not return to a harmful environment as justification for her sick leave. We are not assessing the legitimacy of her taking sick leave, however. We are determining whether one of the DOD's stated reasons for her termination—that she produced no work to reevaluate—is pretextual. Cox's evidence only proves that the DOD

---

given her level of training. Schronagel had no access to any audit records beyond what was given to him by Cox, and, as the district court noted, was therefore not in a position to determine whether they were substantially accurate and complete or timely. Thus, Schronagel's testimony cannot prove that Cox's work met the defendant's expectation.

was aware that she had filed complaints when it terminated her. Yet, "mere knowledge on the part of an employer than an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation." Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989).

III.

Other than her own allegations, Cox has failed to present evidence to refute the DOD's legitimate, nondiscriminatory reasons for her negative midyear review or her termination. Accordingly, the district court's award of summary judgment to the Department of Defense is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
MAY 10, 2005
CLERK U.S. DISTRICT COURT
ALEXANDRIA VIRGINIA

SHARON S. COX,

Plaintiff,

v.

DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE,

Defendant.

No. 1:04cv476

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, defendant's Motion For summary Judgment is GRANTED; and it is hereby

ORDERED that judgment be and is entered in defendant's favor.

Plaintiff has a right to appeal this decision. Under Fed. R. App. P. 3 and 4, she must file a written Notice of Appeal with the Clerk of this Court no later than sixty (60) days from the date of this Order. Failure to file a timely appeal waives the right to review of this decision.

The Clerk is directed to enter judgment in favor of the defendant pursuant to Fed. R. Civ P. 58 and to forward copies of this Order to counsel of record and the pro se plaintiff, Sharon S. Cox.

Entered this 10th day of May, 2005.

s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SHARON S. COX,	)
	)
Plaintiff,	)
	)
v.	)
	)
	No. 1:04cv476
DONALD H. RUMSFELD, SECRETARY, DEPTARTMENT OF DEFENSE,	)
	)
Defendant.	)

MEMORANDUM OPINION

Before the Court is defendant's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 as to the pro se plaintiff's three-count Complaint, which appears to allege three violations of Title VII, 42 U.S.C. §2000(e): (1) gender discrimination with regard to training opportunities, (2) the creation of a hostile work environment, also based on gender discrimination and (3) retaliatory discharge.[1] The Complaint seeks a declaration that defendant violated plaintiff's civil rights, an injunction prohibiting defendant from engaging in such conduct, compensatory damages, lost wages and benefits, reinstatement and promotion, attorneys' fees and costs. The pro se plaintiff has been given notice under Roseboro v.

---

[1] All three of these claims are reflected in plaintiff's administrative complaints and in the Complaint filed in this Court, although the Complaint does not clearly delineate the facts alleged to support each cause of action. Accordingly, the Court has considered plaintiff's gender discrimination charges, even though she states in her Opposition to defendant's Motion To Dismiss that "[t]his case is about reprisal and/or retaliation, not discriminatory discharge and sex discrimination." Pl.'s Opp'n at 2.

Garrison, 528 F.2d 309 [missing] and has filed both a lengthy Opposition to defend [missing] Summary Judgment and a Correction to Response To [missing] Judgment. Finding that the pleadings and the adm [missing] record are sufficiently thorough and that oral argument would not further the decisional process, the Court will resolve defendant's Motion on the briefs submitted by the parties. For the reasons that follow, defendant's Motion For Summary Judgment will be granted.

Factual Background[2]

This civil action concerns plaintiff's tenure as a GS-7 auditor for the Department of Defense ("DOD") in its Office of the Inspector General ("OIG"), a position that she began on October 28, 1998, after having worked for seven years as a full-time secretary for the DOD's internal audit office. Plaintiff was terminated from the G-7 auditor position on October 15, 1999.[3] In her Complaint, plaintiff alleges that almost from the beginning of her employment in the OIG, she was subjected to "a hostile work environment, sexual harassment, repeated threats, intimidation, unfair treatment because of her gender, and one instance of unwanted physical contact." Compl. ¶ 21. The Complaint further alleges that plaintiff's working conditions caused her sleeplessness, anxiety, headaches, diarrhea, joint pain and rashes and required her to take sick and annual leave

---

[2] Because plaintiff is the non-moving party, the following factual recitation is based on her representations. However, because the Complaint and plaintiff's Opposition provide a somewhat disjointed and incomplete version of the facts, the Court has gleaned some dates and details from defendant's Motion. Furthermore, because neither party has provided a clear factual roadmap, this Opinion highlights only those facts that are relevant to the Motion before the Court.

[3] Plaintiff makes much of the fact that she had gained "career" status as a secretary and that the DOD allegedly erred in classifying her as "probationary" when she was hired as an auditor. This probationary status enabled defendant to terminate plaintiff before her one-year anniversary in her new position. However, because plaintiff's EEO Complaints did not allege that the DOD discriminated or retaliated against her in assigning her probationary status, any allegation of an erroneous classification is not relevant to the claims before the Court.

almost continuously from June 7, 1999, until her termination in October of that year. Plaintiff filed two EEO complaints during her tenure, one on February 25, 1999, for gender discrimination, including disparate treatment and the creation of a hostile work environment, and one on June 21, 1999, for retaliation.[4] Plaintiff filed a third EEO complaint on October 18, 1999, after her termination, alleging retaliatory discharge.

After the EEO issued a Final Agency Decision in defendant's favor, plaintiff appealed to the Equal Employment Opportunity Commission ("EEOC"), which conducted four days of hearings, at which plaintiff was represented by counsel, Richard Semsker, Esq. The EEOC ruled for defendant on August 26, 2003, and denied plaintiff's request for reconsideration on January 22, 2004. On April 26, 2004, plaintiff filed a timely appeal of the EEOC's decision.

I. Gender Discrimination

Plaintiff's first gender discrimination claim involves the timing of her training as compared to how male auditors' training was handled.[5] The parties do not dispute that all new federal auditors must attend the Government Accounting Office's Government Audit Standards Introductory Audit Class. The "Audit Handbook" issued by the Inspector General for the DOD states that a new auditor "usually" should enroll in this class within six months of being hired.[6] See Office of the Assistant Inspector General For

---

[4] These are the dates on which plaintiff filed her informal complaints with the EEO office, after which she informed defendant of her actions. Following the EEO's review of her informal complaints, plaintiff filed formal complaints on April 12, 1999, and September 8, 1999, respectively. Plaintiff also filed a Workers' Compensation claim on June 30, 1999.

[5] Plaintiff alternately describes the allegedly unfair delay in her training as based on gender discrimination and based on retaliation for her informal complaints of gender discrimination. The Court has analyzed the issue as a gender discrimination complaint because that is how plaintiff raised it before the EEOC. Regardless of how this claim is characterized, however, the Court's analysis and conclusion as to its merits would be the same.

[6] The Office also has instituted a formal program of on-the-job training, which requires each employee to complete readings, self-

Auditing, Handbook, Ch. 7-8, at 2 (3d ed. 1999). Plaintiff began the course on May 10, 1999, which was six and a half months after her October 28, 1999, start date and a few days after her Midyear Review. She complains that by scheduling two male co-workers to attend the class before their six-month reviews, substituting a male co-worker instead of her into an opening that arose in an April class, and refusing to substitute her for a male auditor hired after her who was enrolled in an earlier class, defendant discriminated against her on the basis of her gender.[7] Plaintiff maintains that any deficiency in her performance was due to the delay in receiving required training and to her being forced to take on audits and write work papers too soon.

In her second discrimination claim, plaintiff alleges that she was subjected to a hostile work environment because of her gender. Although plaintiff faults numerous supervisors for failing to intervene, her claim essentially rests on the alleged behavior of her direct supervisor, Neal Gause.[8] The first event of which plaintiff complains allegedly occurred on November 2, 1998, while she, Gause and Gause's supervisor, Jack Snider,[9] were driving to a site

---

assessments and other exercises and for which the employee has significant responsibility.

[7] In responding to defendant's Motion, plaintiff also asserts in passing that she was retaliated against by being denied an opportunity to attend a higher level of training. This allegation does not appear in her Complaint, however, nor does it seem pertinent, given that plaintiff was terminated before her one-year anniversary and that the employee to whom she compares herself attended the advanced training in his nineteenth month as an auditor. Plaintiff did raise this issue in her April 12, 1999, EEO complaint but stated therein, apparently erroneously, that the male employee had received advanced training before his twelfth month as an auditor.

[8] Gause was removed as plaintiff's supervisor after she sent an e-mail to Gause's boss on February 22, 1999, demanding no further contact with Gause. According to Gause's EEOC testimony, he advocated the change also because the supervisory relationship clearly was not working for either party.

[9] For the most part, plaintiff does not complain about Snider's behavior, except to the extent that he failed to intervene when Gause allegedly harassed her. The Complaint does allege that Snider

visit. During the trip, the men asked plaintiff whether she was married or dating, questions to which she objected. Plaintiff acknowledges that her supervisors stopped the questioning at her request. However, she alleges that on November 20, 1998, during a drive to another audit trip, Gause loudly and crudely described his pre-marital and marital sexual exploits, despite her pleas to him to stop and to Snider to order Gause to do so. Plaintiff also claims that beginning in December 1998, Gause repeatedly began to direct "rages" at her. She described these episodes as "loud, highly animated red-faced bouts of bullying, yelling, and insulting remarks, often in public places." Compl. ¶ 21. Plaintiff maintains that Gause never directed these "rages" at male employees and that she felt that Gause "yelled like [that] because [she was] female." Id.; Tr. Vol. I at 101-2. This behavior humiliated her and made her fear for her physical safety. Compl. ¶ 21. In addition to her complaints of such treatment in the office, plaintiff alleges that during a December 1998 trip to on-site audits in Oklahoma and Alabama, Gause both "raged" at her numerous times and extended what she felt was an improper invitation to drive together to Atlanta, Georgia, on a Saturday. Plaintiff further alleges that on the same trip, Gause attempted to sabotage her audit notes, taking them and the accusing her of losing them before returning them to the shared audit bag.[10] Finally, plaintiff relates a January 29, 1999 meeting in which she says that Gause threatened to beat her like a dog.[11]

---

required plaintiff to have lunch with him every day at the Pentagon until she got out of it by making plans to go walking with a friend. However, plaintiff's own testimony at the EEOC hearings refutes this characterization, as she testified that she enjoyed having lunch with him.

[10] Plaintiff also alleges that on more than one occasion, someone sabotaged or deleted her computer files and that she thinks that it was Gause. As a result of her fears of sabotage, one day plaintiff turned her monitor away from Gause and tipped it over. Gause threatened to write her up for destruction of government property but did not do so.

[11] This meeting occurred after plaintiff accused Gause of threatening to fire her when he outlined the deficiencies in her performance and warned that she risked being terminated if her work did not improve. Plaintiff was so upset by this warning that Gause

Plaintiff also alleges that Gause held her to unreasonable performance expectations and managed her work inappropriately. For example, she maintains that he assigned her impossible projects, such as analyzing a 25-page draft audit in 15 minutes, and then yelled that she possessed only "secretarial skills" when she reported her findings. Plaintiff also complains that Gause made her report to him every ten minutes yet provided her no feedback, written or otherwise, to assist in her development. She lodges the same complaints regarding lack of feedback against Snider and John Dzik, to whom she reported after she requested a transfer from Gause's supervision.[12] Finally, plaintiff points to incidents on march 8, 1999, after she no longer worked for Gause, when he allegedly threatened to fire her,[13] and on April 1, 1999, when he allegedly "rammed his body into her in the hallway. Compl. ¶ 31.

II Retaliation

Plaintiff claims that after seeking assistance with her situation from Snider and his supervisor, John Meling, they retaliated against her for both her informal and formal complaints. Specifically, she alleges that after she complained about how Gause treated her on the field audits in Oklahoma and Alabama, Snider and Meling retaliated against her by denying her the use of credit

---

took her to meet with Snider. According to the EEOC record, in response to plaintiff's request during the meeting with Snider to be given positive feedback and her comment that even dogs like to be petted, Gause told a story about dog training as an example of the value of negative reinforcement. It was this story that plaintiff interpreted as a threat to beat her like a dog, an interpretation with which both Snider and Gause disagreed in their EEOC testimony.

[12] All three men's EEOC testimony and numerous e-mails from Snider regarding plaintiff's assignments refute this contention. Tr. Vol. at 309; Tr. Vol. IV at 40. Specifically, Dzik testified that he prepared written comments on the papers Cox submitted to him before she went to training but that he never had an opportunity to review those comments with her because she continually rescheduled the meetings he arranged, telling him she was too busy with other things. Tr. Vol. III at 53-55.

[13] Gause denies this and testified that he has no authority to fire anyone. Tr. Vol. III at 334.

hours.[14] She also alleges that after she sent an e-mail on February 22, 1999, in which she stated that there was "no choice" but for her to have no contact with Gause, and filed the first of her EEO complaints on February 25, 1999, Snider too began giving her numerous work assignments with unreasonable deadlines. Plaintiff complains that although Snider responded to her complaints about Gause by transferring her to John Dzik's team[15] and assigning her a mentor, Brian Flynn.[16] Snider did not remove her from Gause's work unit, which enabled Gause to continue to harass her.

Plaintiff also characterizes her negative Midyear Review on May 6, 1999, as retaliatory and containing "numerous factual errors and unsubstantiated criticisms," which her supervisors refused to change after she submitted a rebuttal. Compl. ¶ 35. She further claims that the Review was improperly based primarily on the input of Gause, against whom she had already filed an EEO complaint. Although the Midyear Review, which followed that EEO complaint by less than two months, scored plaintiff as needing improvement in every category, save for one that was not applicable to plaintiff, it also recognized that plaintiff had not yet completed her training and suggested that she be given three months to demonstrate improvement after completing the introductory audit class. Plaintiff never took advantage of this tree-month improvement period,

---

[14] Credit hours enable qualified employees to obtain extra leave as compensation for required after-hours work.

[15] Plaintiff appears to have reported directly to Snider from February 22, 1999, when she demanded reassignment, until March 22, 1999, when Dzik became available to supervise her. Before even beginning to work for Dzik, plaintiff complained that he was "gender-biased" and refused to work for him as well, but Pat Brannin, Deputy Director of Acquisition Management Directorate, who was two levels above Snider, researched the allegation and found it to be baseless. Accordingly, plaintiff did report to Dzik for the last month and a half that she reported to work.

[16] Flynn testified before the EEOC that he broke with protocol and addressed some of plaintiff's allegations with Brannin, rather than with plaintiff's supervisors, because her allegations regarding Gause, including the dog training story, concerned him. He also testified, however, that he was satisfied with the explanations he received, which enabled him to put plaintiff's statements in context.

however, because after she attended the required training course for three weeks in May, she immediately took a combination of sick and annual leave from June 7, 1999, until she was terminated on October 15, 1999.[17] Although plaintiff complains that her supervisors made no attempt to get her back to work, correspondence between Snider and plaintiff during that time reveals that Snider warned plaintiff directly that she needed to be at work to demonstrate improvement or she risked termination. He also repeatedly requested in writing further information from plaintiff regarding her absence, which plaintiff did not provide until Snider threatened to terminate her for being away with leave. Three months after plaintiff's Midyear Review, on August 4, 1999, Snider filed a Proposal For Termination From Federal Service ("Proposal"). The Proposal cited both plaintiff's sub-standard performance and her lack of qualifications when hired for the position.[18] Following Meling's review and acceptance of this Proposal, plaintiff was terminated on October 15,

---

[17] During that period, plaintiff worked only one day, June 21, 1999. On that day, as detailed below, she informed her supervisors that she would not be completing substantive work but would instead be concentrating on administrative tasks related to opposing her Midyear Review and to the filing of her second EEO complaint.

According to the Complaint, Gause's actions and failure by plaintiff's supervisors to alleviate the situation precipitated the recurrence of plaintiff's long-dormant lupus symptoms. Plaintiff claims, and the EEOC record reflects, that the clinical psychologist who had been treating her since 1991 "link[ed] his diagnosis of [her]traumatic reaction to 'that office['s]' . . . hostile work environment, and requested that she be moved to another office." Compl. ¶ 33. Plaintiff alleges that her supervisors never responded to faxes from the doctor to this effect. However, those faxes were sent to justify plaintiff's sick leave during her absence, so it is not entirely clear what response she sought, other than the approval of her leave.

[18] The Court need not address plaintiff's extensive arguments regarding her qualifications and whether she was improperly dismissed on this ground because as detailed below, Meling concluded in his review of the Proposal that plaintiff's termination was warranted based on her performance assessment alone.

1999, after which she filed the EEO complaint for retaliatory discharge on October 18, 1999.[19]

Discussion

I. Summary Judgment

Summary judgment is proper under Fed. R. Civ. P. 56 when the pleadings and supporting statements or affidavits show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law.[20] This standard is satisfied when the non-moving party has failed to provide sufficient evidence in support of an essential element of her case on which she has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). All inferences must be drawn in favor of the non-moving party, Thompson Everett, Inc. v. Nat'l Cable Advertising, L.P., 57 F.3d 1317, 1323 (4th Cir. 1995), and evidence is sufficient if, based on that evidence, "the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). However, the non-moving party cannot defeat a motion for summary judgment simply by relying on her own allegations, Fed. R. Civ. P. 56; Celotex, 477 U.S. at 324, but rather must respond with "significant probative evidence." Anderson, 477 U.S. at 249. Under

---

[19] Plaintiff mentions in a footnote in her Opposition that defendant replaced her before actually discharging her. However, she did not raise this issue in her Complaint, nor does she substantiate it in her Opposition.

[20] Plaintiff appears to complain that granting defendant's Motion would improperly deprive her of her day in court. The Supreme Court, however, has explained that summary judgment is "properly regarded not as a procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Schwarger, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

Plaintiff also complains that she is unable to respond properly to the Motion For Summary Judgment because she has not received certain records and defendant has not agreed to stipulations regarding former DOD employees. As defendant stated in its discovery responses and to the Court, the DOD does not retain the records plaintiff seeks for former employees.

this standard, "merely colorable" evidence will not suffice to overcome a summary judgment motion. Id. at 249-50; Thompson Everett, 57 F.3d at 1323.

II. McDonnell Douglas Burden-Shifting Framework

A plaintiff may establish her discrimination claim through either direct or circumstantial evidence. See, e.g., Evans v. Techs. Applications & Servs. Co., 80 F.3d 954, 959 (4th Cir. 1996). When, as here, a plaintiff lacks direct evidence that an employer intentionally discriminated against her, courts employ the burden-shifting method of proof established in McDonnell Douglas Corp. v. Green. 411 U.S. 792, 802-05 (1973); see also Causey v. Balog, 162 F.3d 795, 800 (4th Cir. 1998). Under the McDonnell Douglas framework, a plaintiff must first establish a prima facie case of discrimination. 411 U.S. at 802. The burden then shifts to the defendant to provide a legitimate, non-discriminatory reason for its employment action. Id. Finally, if the employer is able to provide such an explanation, the plaintiff bears the burden of showing that the given reason is a pretext for what was actually a discriminatory action. Id. at 804-05.

III. Gender Discrimination

A. Training Opportunities

To establish a prima facie case of disparate treatment based on gender discrimination, a plaintiff must produce evidence demonstrating all four of the following elements: (1) that she is a member of a protected class, (2) that her job performance was satisfactory, (3) that she was subjected to an adverse employment action by her employer and (4) that similarly situated employees outside of her protected class received more favorable treatment. E.g., EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 n.2 (4th Cir. 2001). As a female, plaintiff undisputably belongs to a protected class. Plaintiff's satisfactory job performance will be assumed for purposes of this analysis. However, the court finds that plaintiff has failed to establish the third element of her disparate treatment claim and therefore cannot establish a prima facie case of discrimination.[21]

An adverse employment action for purposes of Title VII is one that adversely affects the "terms, conditions, or benefits of employment." Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir.

---

[21] Because plaintiff has not established the third element, the Court need not assess the treatment of similarly situated employees.

2001). Conduct short of an "ultimate employment decision," such as firing or demotion, can meet this standard. Id. However, not every action or decision that affects some aspect of an individual's employment affects the "terms, conditions, or benefits" of the employee's position. Id. at 866. Rather, the determination of whether an employer's action or decision constitutes an adverse employment action under Title VII turns on the facts of the case and the nature and extent of the detrimental impact on the employee. See id. at 867. For example, reassignment to a new position might qualify as an adverse action in some cases but not in others, depending on whether the employee's compensation, level of responsibility or opportunity for promotion was decreased. See, e.g., Peary v. Goss, No. 1:04cv966, 2005 WL 884979, at *7 (E.D. Va. April 15, 2005).

In this case, the two-week delay in plaintiff's attendance at basic training beyond the recommended, but not required, time period can in no way be construed to have affected the "terms, conditions, or benefits" of her position. Plaintiff was not denied an opportunity to attend basic training that was granted to other employees, an allegation that might support a claim that she was rendered less able to compete for promotions by the denial. In addition, plaintiff's supervisors accounted for the delay in her training in the Midyear Review at issue in her Complaint, affording plaintiff the benefit of the doubt that her performance could improve upon completion of the class.

Furthermore, even assuming that plaintiff's allegations with regard to the delay in her training qualified as an adverse action, and that plaintiff could otherwise establish a prima facie case of discrimination, she cannot meet her burden under the McDonnell Douglas framework because she has presented no evidence that defendant's reasonable, non-discriminatory explanation for the timing of her training is pretextual. Snider testified in the EEOC hearings that when the list of available class dates was circulated in November, he signed plaintiff up for the next available date, which was in early May, six and a half months after plaintiff's late October start date. Tr. Vol. IV at 119-120. Snider acknowledged that when a cancellation subsequently resulted in an opening in an April class, he enrolled a male employee hired after plaintiff. Id. However, Snider explained that he did so because plaintiff was already enrolled to attend a class in the near future and because by substituting an

employee who was not yet enrolled, the department would not forfeit the fee for the April slot or for plaintiff's, as would be been the case had he transferred plaintiff's enrollment. Snider also noted that plaintiff had numerous ongoing projects to complete in April and that her May class was only one month later. Id. at 168-69, 293-94. With regard to the employee hired after plaintiff for whom she requested that she be substituted in an earlier class, defendant explained in its answers to interrogatories that Snider did not have supervisory authority over that employee and therefore could not control the employee's training schedule. Def.'s Responses To Pl.'s First Request for Discovery ¶ 4.

Especially considering the tightness and inflexibility of government agencies' budgets, the Court finds this non-discriminatory explanation entirely legitimate. Moreover, plaintiff does not offer any evidence to refute Snider's explanation. Instead, she simply repeats her own conclusory allegations that defendant discriminated against her by not providing her with an earlier training opportunity.[22] Such conclusory statements do not constitute evidence upon which a reasonable trier of fact could infer that defendant's proffered explanation is pretextual. Accordingly, the Court finds that defendant is entitled to summary judgment with regard to plaintiff's claim that defendant failed to provide her with training opportunities equal to those afforded male employees.[23]

---

[22] To corroborate her allegations, plaintiff attaches her personal diary to her Opposition. That diary repeats the allegations in the Complaint and does not constitute independent evidence of the allegations therein.

Similarly, in plaintiff's Correction To Response To Summary Judgment, she lists as "documentation" her own allegations and assertions in various forms, including those contained in her rebuttals to the Midyear Review and the Proposal To Terminate, her diary and her EEOC testimony. As discussed above, none of these sources comprises independent evidence sufficient to rebut defendant's non-discriminatory reasons for his decisions concerning plaintiff's training.

[23] Plaintiff alleges one additional instance of disparate treatment—that her supervisors revoked her privilege to use credit hours while allowing similarly situated males to enjoy this benefit. This clearly does not qualify as an adverse employment action.

B. Hostile Work Environment

To substantiate a gender discrimination claim based on a hostile work environment, a plaintiff must demonstrate that (1) she was subjected to unwelcome harassment, (2) the harassment was based on her gender, (3) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive atmosphere and (4) there is some basis for imposing liability on the employer.[24] Causey, 162 F.3d at 801. Under this standard, the Court finds that although Gause's behavior, as described by plaintiff, may have been boorish and at times inappropriate, the alleged actions are not sufficient to make out a prima facie case of gender-based hostile work environment.

The first deficiency in plaintiff's claim is that only two of her allegations—the questions she claims Gause and Snider asked about her marital status and Gause's alleged discussion of his sexual exploits—even arguably tie Gause's behavior to her gender. There is no evidence other that plaintiff's conclusory allegations that the other conduct she found offensive—Gause's "rages," his discussion of negative reinforcement and dog training and his demanding supervision of her work—was motivated by or related to her gender. See Hartsall v. Duplex Products, Inc., 123 F.3d 766, 772 (4th Cir. 1997) ("[Plaintiff] simply cannot show that 'but for' her gender, she would not have been described as one of the 'little people' or as a 'slave.'"). To the contrary, Dzik, who shared an office with Gause, and Flynn, who had known Gause since 1995, testified that they had never witnessed him treating male and female auditors differently. Tr. Vol. I at 210-11; Tr. Vol. III at 176-77. Instead, their testimony supports Gause's own description of himself as interacting with all of his team members, both male and female, as a generally loud, red-

---

Furthermore, even if it did, plaintiff does not provide any evidence to demonstrate that her supervisors' determination that she was not using her credit hours appropriately was pretext for discrimination.

[24] Because the Court finds that plaintiff has not met her burden of demonstrating a gender-based hostile work environment, the Court need not address this fourth factor regarding liability for such discrimination.

faced person, even when not angry.[25] Tr. Vol. III at 270; Tr. Vol. IV at 70-71, 86, 97. As such, plaintiff's personal belief that Gause yelled at her because she was female cannot, without more, substantiate her claim.

Moreover, even if Gause's loud mannerisms and strict supervision were targeted at plaintiff as a female, the conduct she describes is not sufficiently severe or pervasive to constitute a hostile work environment. To determine whether the alleged conduct is sufficiently severe or pervasive, a court must look at the totality of the circumstances, including the frequency and severity of the discriminatory conduct, "whether the conduct is physically threatening or humiliating or a mere offensive utterance and whether the conduct unreasonably interferes with [the] employee's work performance." Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000); see also Anderson v. G.D.C., Inc., 281 F.3d 452, 459 (4th Cir. 2002) ("[Title VII] is not designed to purge the workplace of vulgarity.") (citations omitted). Furthermore, the test is both subjective and objective. Not only must the plaintiff perceive her environment to be hostile, but "conduct that . . . a reasonable person would [not] find hostile or abusive is beyond Title VII's purview."[26] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). The Fourth Circuit also has recognized that personality conflicts and unfair treatment "arise routinely in employment relationships" and do not alone constitute a discriminatory hostile work environment. See Hawkins v. Pepsico, Inc., 203 F.3d 274, 282 (4th Cir. 2000). Finally, as with gender discrimination, conclusory, unspecific allegations of a hostile work environment will not survive a defendant's summary judgment motion. See Causey, 162 F.3d at 801-02.

The Supreme court, the Fourth Circuit and this Court have recognized hostile work environment claims when plaintiffs have

---

[25] Gause also explained that he has a medical condition that makes his face ruddy, for which he takes antibiotics. Tr. Vol. III at 270.

[26] In her Opposition, plaintiff conflates these two standards and erroneously states that a hostile work environment exists if the plaintiff believes that a reasonable person would find the environment to be hostile. Instead, the subjective and objective components of the test both must be met and are independent of each other.

presented evidence of daily and highly offensive treatment. See, e.g., Ocheltree v. Scollon Production, Inc., 335 F.3d 325, 333 (4th Cir. 2003) (plaintiff was subjected to daily discussions of male co-workers' sexual exploits in extremely graphic terms); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 (4th Cir. 2001) (employer constantly referred to African Americans as "monkeys" and "niggers," a term that the court deemed "[f]ar more than a 'mere offensive utterance,' . . . [and] pure anathema to African-Americans"). The courts have emphasized, however, that "Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace" and have granted summary judgment in favor of defendants even when the alleged conduct clearly was inappropriate in some regard. See, e.g., Hartsall, 123 F.3d 766, 771, 773 (4th Cir. 1997) (defendant's statement that "[w]e've made every female in this office cry like a baby" and isolated references to plaintiff as a slave and comments about buxom magazine pictures were "mildly offensive (and unactionable) utterances"); Taylor v. Va. Dept of Corrections, 177 F. Supp. 2d 497, 502-03 (E.D. Va. 2001) (supervisor's "base" behavior during the course of a year, including a handful of derogatory remarks about African Americans and comments that "[b]lacks have too many special rights" and could not be fired, was not sufficiently frequent or severe to create a hostile work environment).

As in Hartsall, plaintiff's allegations, even if taken as true,[27] are "far from the paradigmatic case of sexual harassment." See 123 F.3d at 773. Plaintiff does not allege that she was subjected to "rages" every day, nor does she report the repeated use of vulgar, graphic sexual terms or inherently demeaning language, or even that Gause's behavior was so degrading that she was unable to perform her job. To the contrary, plaintiff contends that she was performing above par and deserved a strong Midyear Review. Accordingly, plaintiff has failed to carry her burden of establishing a prima facie

---

[27] Gause and Snider, the latter of whom Meling described in his testimony as "straight-laced," deny that Gause told Cox sexual stories. Tr. Vol. IV at 122, 264. Dzik also testified that he had never heard Gause tell sexual jokes or stories, either in the office or during work-related travel, and that he had witnessed the alleged "rages" plaintiff describes and that she did not seem intimidated. TR. Vol. III at 45-46, 71-75.

case of a hostile work environment, and defendant is entitled to summary judgment on this claim as well.

IV. Retaliation

To establish a claim of retaliation, a plaintiff must show (1) that she engaged in protected activity, such as filing an EEO complaint, (2) that the employer took an adverse action against her and (3) a causal connection between the protected activity and the adverse action. Causey 162 F.3d at 803. As above, in the absence of direct evidence of retaliation, which plaintiff has not presented in this case, a court must employ the McDonnell Douglas burden-shifting framework. In this regard, close proximity between the protected activity and the adverse action, "gives rise to a sufficient inference of causation to satisfy the prima facie requirement." King v. Rumsfeld, 328 F.3d 145, 151 (4th Cir. 2003). However, in considering whether a plaintiff has successfully rebutted her employer's non-discriminatory explanation for her termination, the Fourth Circuit has noted: "Plainly, mere knowledge on the part of an employer that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee." See Williams v. Cerberonics, Inc., 871 F.2d 452 (4th Cir. 1989).

A. Midyear Review

Plaintiff is able to establish a prima facie case of retaliation in that her poor Midyear Review on May 6, 1999, closely followed her February 25, 1999, EEO complaint. However, as in Williams, plaintiff has not produced sufficient evidence to demonstrate that defendant's non-discriminatory explanation for her negative performance assessment is pretextual. Therefore, she cannot establish a causal connection between the protected activity and the adverse action. See 871 F.2d at 459.

Plaintiff's own evidence supports the conclusion that defendant was concerned about her performance deficiencies and had communicated those concerns to her well in advance of her first informal EEO complaint on February 22, 1999. In that complaint, which plaintiff attaches to her Opposition, she asserted that: (1) on December 17, 1998, Gause said that she had not completed her work papers; (2) on January 5, 1999, Snider and Meling revoked her privilege to accrue credit hours because she was not completing her work papers; (3) in January 1999, Gause began to supervise her

work closely; (4) on January 29, 1999, Gause told her that she possessed only secretarial skills, that she was not meeting the requirements of her job, that her work papers were useless and that if she did not improve her performance, she was at risk of termination; (5) on February 2, 1999, Gause told her that her work papers were not fit to be reviewed and that her reasoning was illogical; and (6) on February 11, 1999, Gause began to require her to report to him every ten minutes. In addition, in a memo to Snider dated February 25, 1999, plaintiff appeared to acknowledge the poor quality of her work, which she attributed to a lack of training, and she asked for an extension of a work paper deadline. Plaintiff's representations to the EEO are consistent with defendant's comments about her performance in the Midyear Review and the testimony of her supervisors, both of which detail her failure to complete her assignments to standard and on time.[28] The Midyear Review and the testimony also both reflect that plaintiff failed to improve, even with significant supervision, and reiterate that plaintiff's supervisors made her aware of her deficiencies well in advance of plaintiff filing her first EEO complaint.

Not only do plaintiff's representations to the EEO support defendant's position that there was no connection between plaintiff's first EEO complaint and her Midyear Review, but plaintiff offers nothing beyond her own assertions to demonstrate that the Midyear Review was retaliatory, rather than an accurate reflection of her

---

[28] The Midyear Review reported that plaintiff did not follow her supervisors' guidance or the credit hour policies, often lost documents, could not complete her work on time, frequently requested extensions, was not organized or prepared on site, resisted researching data and submitted work papers with sentence fragments, unexplained acronyms, incorrect audit steps, unclear logic and inaccuracies. John Dzik testified to similar deficiencies in the work papers plaintiff completed for him before she went to training, which were not included in the Midyear Review. Tr. Vol. III at 46-49.

Snider and Meling's visit to Kimberly Brackett, Supervisory Personnel Management Specialist, in early February 1999 provides further support for defendant's argument that plaintiff's supervisors expressed dissatisfaction with her performance before her EEO complaint.

performance deficiencies.[29] Although plaintiff submitted a detailed rebuttal to the Midyear Review, both orally and in writing, she did not provide evidence that refuted the comments in the Review. Instead, she pronounced the comments "false" and designed by Gause to harm her and to retaliate for her previous EEO complaint. Although plaintiff argued that Gause had miscalculated the number of days that it took her to complete her work papers, and although Gause acknowledged some degree of error in those calculations during the EEOC hearings, Gause also explained that plaintiff had confused two different calculations and that the error was not material to his overall assessment of her performance. The excerpt from the hearing submitted by plaintiff truncated that explanation. Tr. Vol. IV at 37-39.

As with her disparate treatment and hostile work environment claims, plaintiff has offered only her own conclusory assertions, without documentation or corroboration, in support of her claim that the Midyear Review was false and retaliatory. Moreover, even plaintiff's own evidence supports the conclusion that her supervisors were dissatisfied with her performance long before she filed her first EEO complaint. Accordingly, plaintiff has failed to rebut defendant's reasonable, non-retaliatory explanation for the negative Midyear Review and establish the third prong of her retaliation claim.

B. Termination

For the same reasons stated above, the Court finds that plaintiff has failed to produce sufficient evidence that defendant's non-discriminatory explanation for her termination is pretextual and

---

[29] Possibly recognizing that her own allegations are not sufficient to withstand defendant's Motion, plaintiff has attached to her Opposition the affidavit of Mr. Henry Schornagel, a retired G-14 [sic] auditor with the General Accounting Office and the Department of Justice, who also testified before the EEOC. Schornagel states in his affidavit that he has reviewed plaintiff's work papers and found them acceptable, given her level of training. The Court does not credit this evidence, however. Host important, as the administrative law judge also observed, this witness possesses no knowledge of whether plaintiff's work papers were substantively accurate and complete, seemingly the most critical aspects of plaintiff's performance.

that the adverse action instead was retaliatory. The parties do not dispute that the Proposal To Terminate was issued three months after the negative Midyear Review, in which plaintiff had been warned that she could be terminated if she did not improve her performance within three months. During that warning period, plaintiff received the benefit of the introductory training class, but thereafter she did not return to work, save for one day. Plaintiff's absence rendered her unable to demonstrate the requisite improvement, prompting Snider to submit and Meling to approve the Proposal.

Again, plaintiff's own, unsupported assertions do not establish that defendant terminated her in retaliation for her previous complaints. Plaintiff relies primarily on the document she submitted in response to the Proposal To Terminate, in which she advanced an odd combination of arguments—including accusing her supervisors of misrepresenting the quality of her work while simultaneously acknowledging that she had made errors and stating a desire to correct them. Plaintiff also pointed out that Snider had written positive comments on at least one of her work papers and had not written negative comments on others. However, as Meling explained in his review of the Proposal To Terminate, plaintiff appeared to misunderstand the process through which work papers are edited. She would not have gotten personal credit for the positive comments on a final paper, which would have included her supervisors' corrections.[30] In addition, plaintiff acknowledged in her response that the four work papers she submitted to Dzik in the days between the Midyear Review and training were missing information, employed inaccurate audit steps and/or referenced attachments that were not included. Although she requested an opportunity to correct those work papers, because she did not return to work after completing training, she never did so.

Lastly, plaintiff's extended absence clearly justifies defendant's decision to terminate her. As noted above, after completing training, plaintiff only came to work on one day, during which she appears primarily to have made a list, which she

---

[30] Plaintiff also accused Snider of falsifying the dates on her drafts to make it appear as if she had submitted them as final copies. Plaintiff provides no evidence other than her allegations to support this claim and again appears to misunderstand the process by which her work was reviewed and edited into final form.

submitted to Snider and Meling, of tasks she needed to complete related to contesting her Midyear Review, filing a second EEO complaint, submitting sick leave documentation and checking her computer for signs of sabotage. In response to this list, and apparently in an attempt to warn plaintiff of the risk of continued absence, Snider sent her a letter counseling that if at all possible, she needed to be at work to demonstrate that she could perform to standard or else she could face termination.[31] Plaintiff's argument that defendant should have transferred her or taken other less drastic action, such as granting her leave without pay, is unavailing. The regulation she quotes for this proposition clearly states that removal is a proper remedy when a federal employee is not performing up to standard, and plaintiff does not contest the testimony of Kimberly Brackett, the supervisory personnel management specialist, that plaintiff never requested leave with pay, as would be required to receive that accommodation. See Pl.'s Opp'n at 16 n.12; Tr. Vol. II at 269.

Other than her own allegations, plaintiff has again failed to present any evidence to refute defendant's legitimate, non-retaliatory explanation for terminating her. Accordingly, defendant is entitled to summary judgment on plaintiff's retaliatory discharge claim.

Conclusion

For the reasons set forth above, defendant's Motion For Summary Judgment will be granted, and judgment will be entered in favor of defendant. An appropriate order will issue.

The Clerk is directed to forward copies of this Memorandum Opinion and the accompanying Order to counsel of record and the pro se plaintiff, Sharon S. Cox.

Entered this 10th day of May, 2005.

s/_____

Leonie M. Brinkema
United Stated District Judge

Alexandria, Virginia

---

[31] The letter also addressed the insufficiency of plaintiff's medical documentation for her leave.